United States Court of Appeals

for the Second Circuit

APPELLEE'S REPLY BRIEF

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

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BERNARD FRIED,

Plaintiff-Appellant,

- against -

Robert O. Lowery, et al.,

Defendant-Appellees

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REPLY TO APPELLEES' BRIEF

On Appeal from the United States District Court

for the Eastern District of New York

APPELLANT'S REPLY TO APPELLEES' BRIEF *- by L. KEVIN SHERIDAN, THOMAS P. BARTLEY, AN D S. A. HIRSHOWITZ, Attorneys for Appellees

* Appellant's Reply is for all Appellees

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LAW DEPARTMENT
CITY OF NEW YORK

UNITED STATES COURT OF APPEALS
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OCT 15 1975
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SECOND CIRCUIT

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

BERNARD FRIED,

Plaintiff-Appellant

- against -

ROBERT O. LOWERY, et al.,

Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

Appellant's Reply to Appellees Briefs

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REPLY BRIEF

Argument: The Appellant and all the Appellees are or were either employees or agents of the City of New York. Appellees' attempt to portray the judiciary and county clerk as employees of the State is ludicrous.

Salaries of all appellees are paid directly by the City of New York. All deductions for taxes and pensions are made by the City of New York, and paid into the pension system of the City of New York. The County Clerk is appointed by the Mayor of the City of New York. Current news items indicate the possibility of legislation being enacted for the State take over of the State Court System. In fact the chief of litigation of the State Attorney General, as previously indicated, and contained in the Original Record, denied to the appellant that the State had jurisdiction over the Supreme Court State of New York. For that reason appellant had requested in his complaint for a determination as to the jurisdiction over the State judiciary, and withheld the continuation of his cause of action based upon the suppression of the file containing the pleadings of the Article 78 Petition, upon which the res judicata decision was improperly rendered. Accordingly appellant submits that all pleadings which were interposed by the Attorney General State of New York, must be stricken on the grounds that the Attorney General State of New York, lacked jurisdiction to defend the judiciary and County Clerk. Appellant concedes that prosecution for malfeasance was possible.

The Judiciary and County Clerk are therefore <u>not immune</u> under the doctrine of Judicial Immunity. For the Court has held that,

> " No public officer is responsible in a civil suit for a judicial determination, however wrong or malicious. <u>Liabilty does ensue</u> if a ministerial or non-discretionary act is done wrongfully.**** and
> " The immunity does not extend to a Court's employee who performs no judicial functions e:g: a court stenographer."
> Waterman v. State 232 S2(AD) 22
> Rothcamp v. Young 249 S2(AD) 330

The Complaint is not time barred, because the Complaint had been instituted under the CPLR State of New York, Section of Fraud.

> "**** if the action is brought by a plaintiff who seeks to start the Statute running from from the time he did or could have discovered the fraud, the action must be commenced either before the expiration of 2 years after the actual or imputed discovery or before 6 years from the fraud." CPLR State of New York, 203(f)

The appellant did not discover the fraud until 1973, and instituted an action in 1974. The time of the fraud is 1968. In the Complaint and in other pleadings appellant indicated the specifics of the fraud. Appellant respectfully directs the Court's attention to the Original Record.

The Complaint is not insufficient and states a claim upon which relief can be granted. The Complaint has also stated substantial Federal Questions, including the Constitutionality of Section B3-39.0, of the Administrative Code of the City of New York, as was fully indicated in the Complaint.

> " Any State Law or Act, of any Department of the State, which is contrary to or in conflict with Federal Law is invalid." CPLR NYS 1012(b)

" The Court will act only if an actual case is before it requiring a decision concerning the Constitutionality of a Statute.

One who challenges the Constitutionality of a Statute must show that his special peculiar personal rights will be unfavorably affected if the Statute is upheld, and he must show its unconstitutionality beyond a reasonable doubt,**** " St. Clair v. Yonkers Raceway 13 NY2. 72

Appellant submits that he has proven the said Section B3-39.0, of the New York City Administrative Code is in conflict with Rule 35(a) Fedral Rules Civil Procedure Title 28, USCA, in the Complaint.

The doctrine of res judicata and estoppel does not apply and is not a bar in this case. For the Court has held that,

"***** but where the supporting affidavits, together with pleadings, present genuine issues as to the material fact of the scope and coverage of the judgment in the State Courts, a Motion to Dismiss must be denied.***"

U.S.-- Philadelphia, Workingmen's Sav. & Bldg. Assn., v. Albert M. Greenfield & Co., D.C Pa., F.R.D. 71

The Court further held that,

"*** res judicata an affirmative defense under Rule 8(c), and therefore can not be raised by a Motion to Dismiss, as to where such Motion is addressed to the sufficiency of the Complaint."

U.S.--Zeligson v. Hartman-Blair, Inc., C.C.A.Kan., 135 F.2d 874

The Complaint stated substantial Federal questions, and the Complaint therefore is not insufficient. The Complaint may have overstated the causes of action and lumped them all into one. The Court has held however that that does not make a Complaint defective, for the Court can consider the subject matter rather than the costruction of the Complaint.

The appellees, by their aspersions, innuendos and implications, which they cast upon the appellant in the Brief on the Appeal, indicate to what depths of depravity they will not stoop in order to perpetuate the stigma and method of retirement, which is now admitted by appellees to have been improper, and unduly imposed without due process upon the appellant. Now,after 7 years of litigation, that that fact is admitted by the appellees, instead of offering to to negotiate for restitution or to make amends, counsel for appellees continue to unlawfully expend taxpayer's funds, for the further denial and deprivation of appellant's Civil and Constitutional Rights, and resisted every effort and offer made by appellant for an amicable and equitable settlement. Plaintiff-appellant suggested the following arrangement that could have been made possible. Because of the elapsed years, were the appellant at this time to have been reinstated by the appellees, sufficient fringe benefit time under the existing work contract would have been accumulated so that appellant could be carried on an active payroll, without having to be actively assigned, and appellant was even willing to agree that thereafter he would voluntarily retire as of age 65. This suggestion however was turned down by counsel as they continued to look to the Courts for the continuance of the blocking of appellants efforts for the evidentiary hearings which he has been denied under Federal Due Process, and at the same time continue by legal maneuvers to seek a dismissal upon technicalities and not upon the merits of the case,under which appellant could not have been deprived of his rightful claim to his position .

Furthermore, the allegations made by counsel for the appellees, to the effect that the Hon. Mr. Justice Platt, who signed the Order on Appeal, had intended this erroneous dismissal to be final, is false as the other pleadings heretofore made by them. The truth in fact is that the Hon. Mr. Justice Thomas C. Platt, at a hearing held before him on a Motion which had been made for a rehearing of the matter and upon which a motion had thereafter been made to withdraw that Motion without prejudice because of the illness of the attorney Mr. Dechter, stated that he would have entertained a Motion for leave to reamend the Compalint, and that he would have granted such motion Mr. Dechter not been taken ill. For counsel for the appellees to continue to make such false and baseless statements, merely in an attempt to further injure the appellant, even after it has been admitted in the briefs that the retirement was improper and therefore unlawful, is contrary to every democratic principle that the United States has ever stood for, and for which many men have fought and died .

Conclusion: Wherefore, your appellant prays the Court for the reversl of the Order on Appeal herein, and for such other and further relief as the Court may deem just and proper.

Queens N.Y.
October 15, 1975

Respectfully submitted,
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